No. 230.

Brief of Curtis H. Lindley for Appellee.

Filed March 26, 1898.

IN THE SUPREME COURT OF THE UNITED STATES

AUSTIN WALRATH, *Appellant,*

vs.

CHAMPION GOLD MINING COMPANY, *Appellee.*

Brief for Appellee.

CURTIS H. LINDLEY,
LINDLEY & EICKHOFF,
Solicitors for Appellee.

IN THE SUPREME COURT

OF THE

UNITED STATES.

AUSTIN WALRATH,
Appellant,

vs.

CHAMPION GOLD MINING COMPANY,
Appellee.

History of the Case.

The action was originally commenced by filing a complaint in the Superior Court of Nevada County, California, by the appellant herein, whereby he sought to recover from the appellee the sum of $300,000, as damages caused by a trespass alleged to have been committed by the appellee upon the mining property familiarly called the "Providence Mine," belong-

ing to appellant and his co-owners. Coupled with the demand for damages was a prayer for equitable relief of injunction against future threatened trespasses. The case was removed to the United States Circuit Court, Ninth Circuit, Northern District of California, upon the application of appellee, on the ground that Federal questions were necessarily involved in the determination of the case upon its merits. When the record was filed in the Federal Court, appellant filed repleaders, proceeding by amended bill on the equity side of the court for the purpose of obtaining injunction, *pendente lite*, and perpetual (trans., p. 46), and on the law side by amended complaint to recover the alleged damages.

The equity case alone was tried. The answer of the appellee filed to the amended bill (trans., p. 57) admitted generally the ownership of the appellant and his cotenants of the Providence Mine, but in effect denied entry upon any portion of that mine. Were it not for the nature of the equitable relief sought, the pleadings of the parties and the record before this Court might be said to characterize the case as an action of trespass to try title to an underground segment of a ledge of rock in place carrying gold and silver, which ledge has its apex within the lands of both parties, passing on its strike or onward course out of the surface boundaries of the one into those of the other. In other words, the controversy is between two mining proprietors upon the same vein or ledge, and the question to be determined by the trial court

was, *By what vertical bounding planes are the respective rights of the parties to be limited and defined?*

The trial court declined to adopt the views of either party, but entered a decree establishing a bounding plane independently of their several contentions. From this decree appellant prosecuted an appeal to the Circuit Court of Appeals, Ninth Circuit. The appellate court, in its decision on the appeal (trans., p. 277), directed a modification of the decree of the court below, and, as thus modified, affirmed it.

The scope of the decree of the trial court and the extent to which it was ordered modified by the Circuit Court of Appeals will be fully considered after the facts shall have been outlined.

The present appeal brings up the entire record, and seeks to review the judgment of the Circuit Court of Appeals, modifying and as modified, affirming the decree of the trial court.

The relative situation of the properties of the parties litigating, their respective contentions, and the views of the trial court and Circuit Court of Appeals will be fully represented by the aid of diagrams, lettered uniformly to correspond generally with the exhibits used at the trial and with the small plat forming a part of the opinion of the trial court, reproduced opposite page 84 of the transcript on appeal.

Statement of Facts. — Title of Appellant.

The essential facts of this case are so clearly stated in the opinion of the learned judge who tried the cause (trans., pp. 82–93) that further elaboration seems quite unnecessary. Yet for the purpose of logically presenting the appellee's views upon the law to be considered, a brief statement of these facts as shown by the record, and concerning which there is no controversy, is convenient if not important.

The title of appellant to the "Providence Mine" rests primarily upon a mineral patent issued by the Government of the United States under the Act of July 26, 1866, and the additional rights conferred upon the holders of that class of patents by the Act of May 10, 1872. The patent is printed in full in the transcript (pp. 250–255).

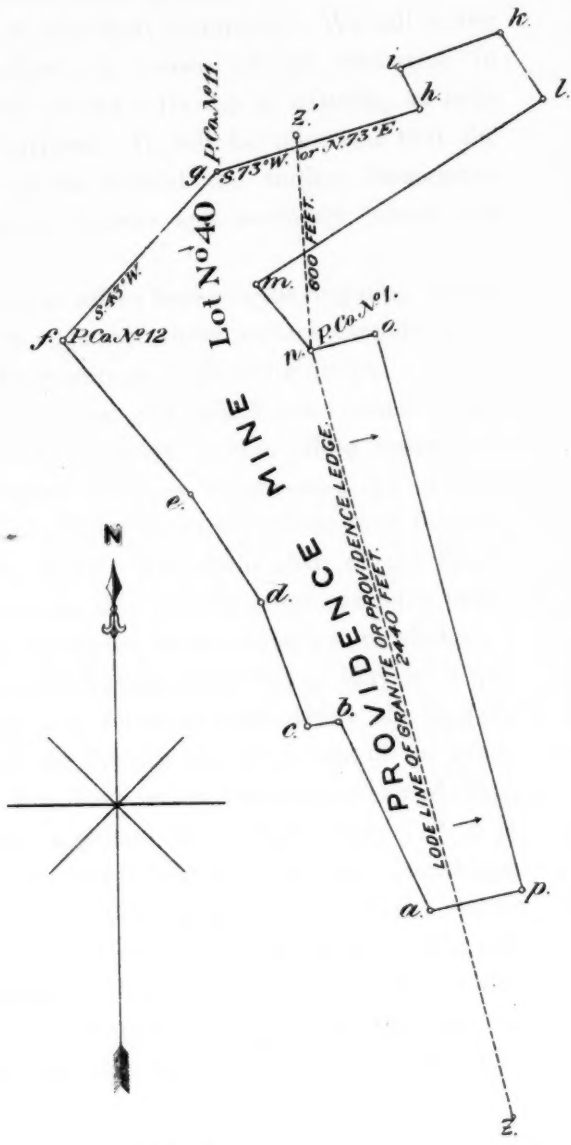
It purports to grant the Providence ledge, vein, or lode in its entire width, for the distance of 3100 linear feet, along the course thereof, together with the surface ground described by metes and bounds.

Accompanying the patent, and forming a part of it, is a map or plat, the essential features of which we herewith reproduce, designated as Fig. 1, inserted opposite this page.

This figure represents the Providence "location" as patented, and the lines *a b c d e f g h i k l m n o p* are the *lines* of such location described in the patent.

The lode or ledge *z–z'*, traversing the location in a northerly and southerly direction, is the lode or ledge

FIG. 1.


k.
i.
h.
l.
Z.
g. P. Co. No. 11.
S. 73° W.
or N. 73° E.
600 FEET.
S. 45° W.
m.
Lot No 40
f. P. Co. No 12
n.
P. Co. No 1.
o.
MINE
PROVIDENCE
OR PROVIDENCE LEDGE.
LODE LINE OF GRANITE
2440 FEET.
e.
d.
c.
b.
a.
p.
N.
N

described in the patent as the "Providence Ledge," and it is the only ledge granted by the Government at that time to appellant's grantors. We call it the "Granite Ledge" by reason of the formation in which the vein occurs. Its dip is easterly, as indicated by the arrows. It will be observed that the lode line projects beyond the surface boundaries northerly (about 30 feet) and southerly (about 670 feet).

No controversy arises between the litigating parties with reference to either these surface boundaries as such, or to the granite or Providence ledge.

The lines *a–p* and *g–h*, which are crossed by this ledge, are factors, however, of controlling importance, to be considered later on. Otherwise we are not interested in *this* ledge or its pursuit beyond the surface boundary lines. The main shaft of the Providence is sunk on this granite ledge, and for many years mining operations were confined to this ledge.

Long after the passage of the Act of May 10, 1872, another ledge was found to exist within the surface boundaries of the Providence, lying west of the granite ledge, and for that reason called by the Providence Company and appellant the "Back Ledge." It is called also the "Ural Ledge," from the fact that it traverses property lying some distance to the northwest, formerly known as the "Ural Mine." We call it the "Contact Ledge," for the reason that it lies between two formations — granite on the east or hanging wall, and slate on the west or foot wall. The

relative position of this ledge with reference to the granite ledge is shown on the diagram designated as Figure 2, inserted opposite this page.

This back or contact ledge, marked on the diagram (figure 2) x'–x'', crosses on its southerly onward course the Providence boundary line f–g at the point v. Its continuous course southerly is definitely established as far as the point x'. Beyond that point its course is a controverted question, although of no overshadowing importance. The course of the line f–g is S. 43° W., or N. 43° E.

This back or contact ledge, so far as it has been developed within the Providence lines, is admitted to be practically parallel to the granite ledge, and, so far as known, they descend into the earth on practically parallel planes (trans., p. 133).

Figure 3, inserted following figure 2, opposite this page, is a vertical section drawn through the Providence shaft, and will illustrate the relative position of the two ledges as they descend into the earth.

The Providence has reached the contact or back ledge by means of two crosscuts, driven through the country rock from the 600 and 1250 levels of the main shaft on the granite ledge, and all the Providence workings on the back ledge are reached by means of this shaft and the two crosscuts (trans., p. 141). The horizontal distance between the two veins is approximately 500 feet.

FIG. 2.

PROVIDENCE MINE
LODE LINE OF GRANITE OR PROVIDENCE LEDGE.
2440 FEET.
Lot No 40
BACK OR CONTACT LEDGE.
S. 45° W.
S. 73° W.
or N. 73° E.
600 FEET.
P'Co. No 12
P'Co. No 11.
P'Co. No 1.
N
a.
b.
c.
d.
e.
f.
g.
h.
i.
k.
l.
m.
n.
o.
p.
q.
x.
x'
x''
z.
z'

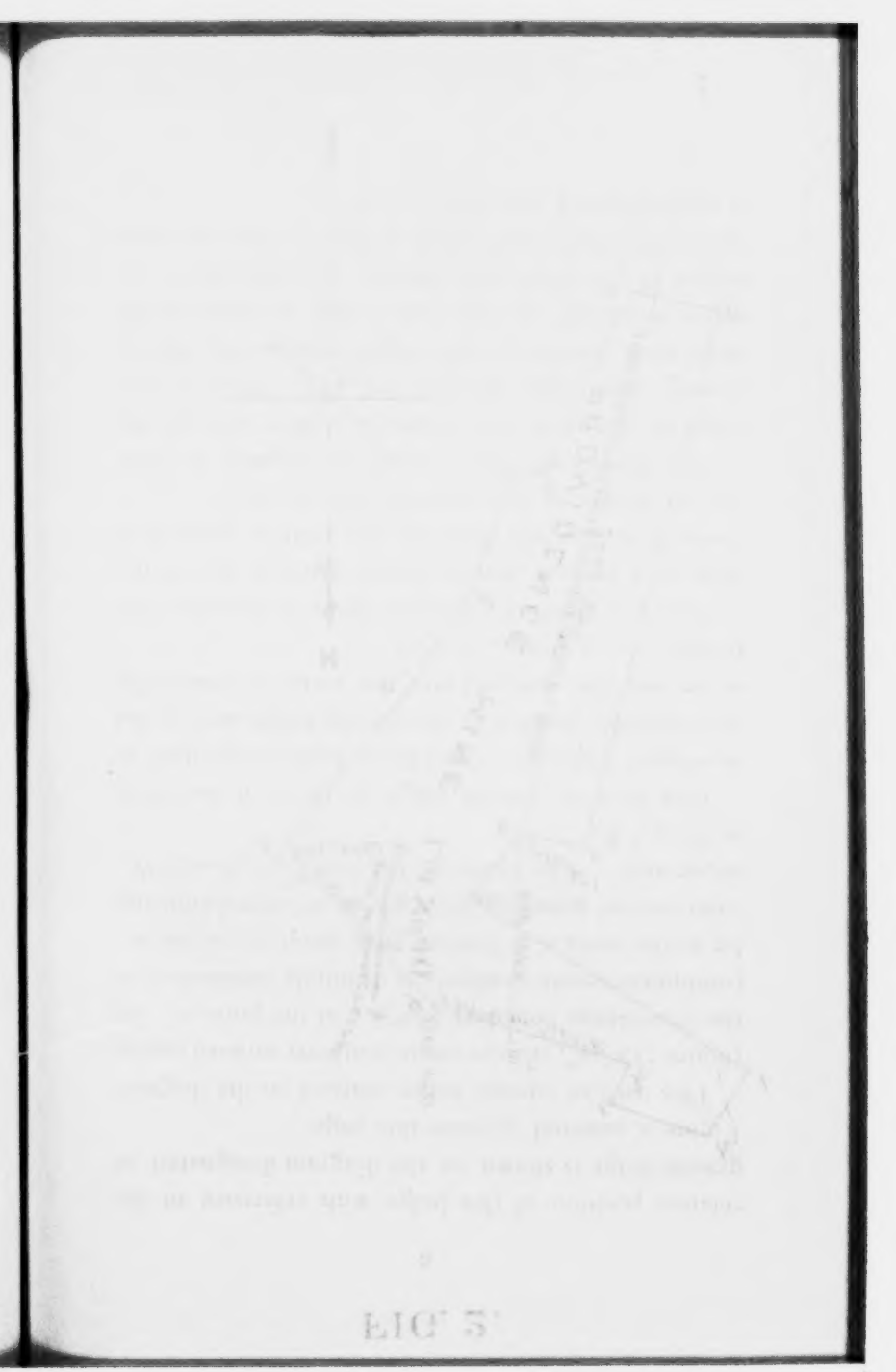


FIG 5

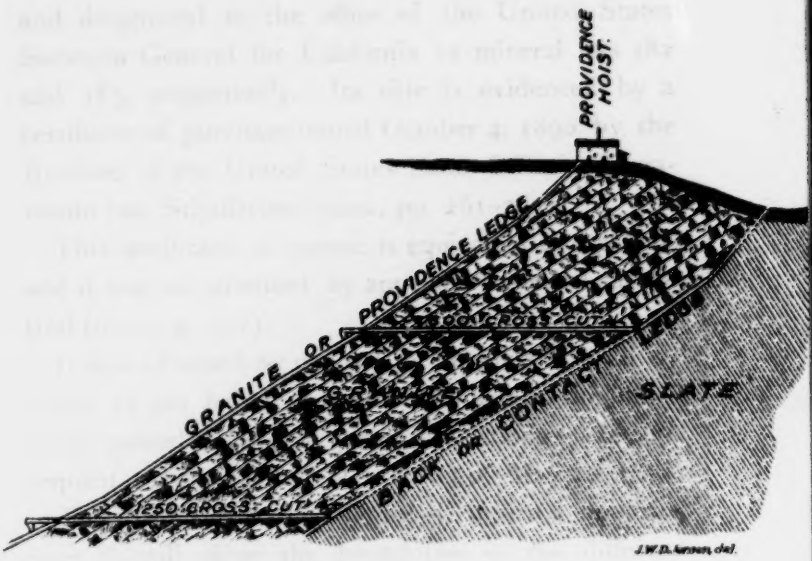

PROVIDENCE HOIST.
GRANITE OR PROVIDENCE LEDGE
1500 CROSS CUT
SLATE
BACK OR CONTACT
1250 CROSS CUT

FIG. 3.

Title of Appellee and Locus of the Alleged Trespass.

The Champion Gold Mining Company, appellee, is the owner of two mining claims, commonly known as the New Years and New Years Extension Mines, and designated in the office of the United States Surveyor General for California as mineral lots 182 and 183, respectively. Its title is evidenced by a certificate of purchase issued October 4, 1890, by the Receiver of the United States Land Office at Sacramento (see Stipulation, trans., pp. 261–263).

This certificate, of course, is equivalent to a patent, and it was so admitted by appellant's counsel at the trial (trans., p. 201).

It was admitted by counsel for appellee that all *its* rights to the ledge in controversy and to the mines above named accrued by virtue of locations made subsequent to the passage of the Act of May 10, 1872.

The diagram marked figure 5, inserted opposite page 8, will show the boundaries of the different mining claims involved and the relative situation of the properties of the contending parties, the course of the "Back," "Ural," or "Contact" ledge through them, the underground workings of both appellant and appellee on this ledge, and the operation of the bounding planes contended for by the respective litigants and those fixed by the court below, and will enable us to explain the situation as it was presented to the trial court with reference to the alleged

encroachment of the appellee on the asserted rights of appellant.

This figure 5 may be termed a horizontal projection, and is a composite compiled from the various exhibits used at the trial and on the argument before the Circuit Court of Appeals.

From this diagram (figure 5) it will be observed that the ledge in controversy enters the west side line of the New Years (lot 182), passes through the collar of the Champion shaft (which is sunk on the ledge), and then crosses the north end line of the New Years extension lot 183, traverses this lot, and passes out of and through the south end line at the point "*v*" into the Providence. The two end lines of the New Years extension are parallel, and that they are both crossed by this ledge is established by the testimony of the engineer, C. E. Uren (trans., pp. 162–164).

The drifts colored red extending northerly and southerly from the Champion shaft are the various levels extended underneath the surface on the vein in controversy, the shaft following the vein on its downward course. The yellow lines in the Providence denote the two crosscuts extending west from the shaft on the Providence ledge through the granite to the back or contact ledge, as shown heretofore on the vertical section (see figure 3). The blue lines indicate the various drifts and levels extended by the appellant and his grantors on the ledge in dispute. The alleged trespass in this action consists in the

extension by the appellee of its levels southerly across the bounding plane drawn through the line *f–g* produced in the direction of *g'*, and in extracting ore from the vein on the southeasterly side of said bounding plane. It will be observed that none of the underground workings of the Champion penetrate the bounding plane contended for by it, drawn through the line *v–v'*, and that it has extended two of its drifts a short distance only beyond the bounding plane fixed by the Court.

Contention of the Parties.

The diagram marked Fig. 4, inserted opposite page 10, will illustrate the contention of the parties.

Appellant contended that, as the contact ledge *x''–x'* on its course crosses the line *f–g* (see figure 4), that line becomes in law an end line, and the vertical bounding plane should be drawn through the line *f–g*, and that line produced indefinitely in the direction of *g'*.

Appellant also contended that the line *f–g* was acquiesced in by appellee as a common boundary, and by reason of certain acts of its agents the appellee is estopped from disputing appellant's claim to the bounding plane drawn through *f–g*, and that line produced indefinitely in the direction of *g'*.

The appellee contended in the trial court, that appellant's rights on all ledges apexing within his boundaries must be fixed with regard to the *end lines of his location* and their general direction, as described in

the patent and delineated upon the map accompanying it; that the only lines appearing upon his plat (see figure 1, opposite page 4) which at all fulfill the natural or legal definition of end lines are the lines crossed by the lode *z–z'*, to wit: *g–h* and *a–p*, and they must be construed to be the lines referred to in the Act of 1872, "as the end lines of their location;" that the rule enunciated by the Circuit Court of Appeals, Ninth Circuit, in *Tyler* v. *Sweeney*, 54 Federal Reporter, 284, is applicable to this case, and affords the only consistent legal solution of the controversy between the parties. (See Lindley on Mines, § 591.)

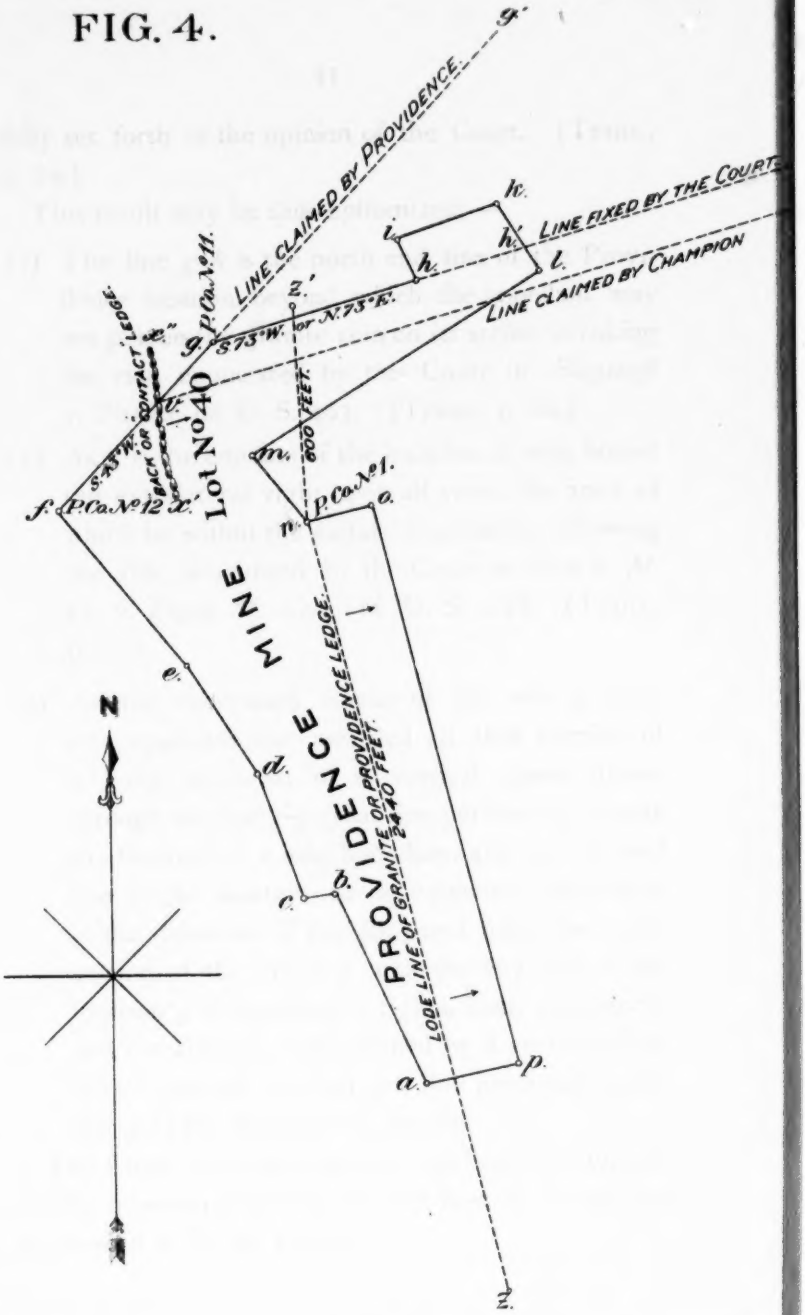
This rule would apply the line *g–h* (*vide* figure 4, opposite this page), with a course S. 73° W., or in the direction of the dip N. 73° E., at the point *v*, where the ledge in controversy on its course southward crosses the boundary line *f–g*. This application would give us a bounding plane through *v–v'*, and that line produced indefinitely in that direction.

The Decision of the Trial Court.

The trial court differed with both parties, and entered a decree fixing a bounding plane to be drawn through the line *f–g* to its intersection with the line *g–h*, and thence N. 73° E. through the line *g–h*, and that line produced indefinitely in the direction of *h'–h''*, thus awarding appellant all that portion of the ledge within the Providence ground, lying respectively southeast and south of said planes (Decree, trans., p. 80).

The reasoning upon which the result was based is

FIG. 4.


LINE CLAIMED BY PROVIDENCE.
LINE FIXED BY THE COURT.
LINE CLAIMED BY CHAMPION
P.Co.№11.
S.73°W. or N.73°E.
600 FEET.
BACK OR CONTACT LEDGE.
S.43°W.
Lot №40
P.Co.№12.
P.Co.№1.
MINE
PROVIDENCE
LODE LINE OF GRANITE OR PROVIDENCE LEDGE.
2440 FEET.
N.

fully set forth in the opinion of the Court. (Trans., p. 82.)

This result may be thus epitomized:—

(1) The line *g–h* is the north end line of the Providence location, beyond which the appellant may not pursue the granite vein on its strike, invoking the rule enunciated by this Court in *Flagstaff* v. *Tarbet*, 98 U. S. 463. (Trans., p. 88.)

(2) As it is the end line of the location, it must bound the extralateral right upon all veins, the apex of which lie within the surface boundaries, following the rule announced by the Court in *Iron S. M. Co.* v. *Elgin M. Co.*, 118 U. S. 248. (Trans., p. 91.)

(3) As the downward course of the vein is easterly, appellant was awarded all that portion of it lying southeast of a vertical plane drawn through the line *f–g* (that line performing merely the function of a side boundary, and not an end line of the location, to be extended indefinitely in the direction of the dip,) and from the intersection of the line *f–g* with the end line of the location *g–h*, appellant's rights, both intralimital and extralateral, were defined by a vertical plane drawn through *g–h* and that line produced indefinitely in the direction of the dip.

The Court also ruled against appellant's contention on the question of an agreed end line, or an end line acquiesced in by the parties.

The Decision of the Circuit Court of Appeals.

The modification of the decree of the trial court, directed by the Circuit Court of Appeals, is stated in the opening paragraph of the opinion (trans., p. 277,) which we quote:—

"In so far as the decree appealed from limits the "*extralateral* right of the complainant to follow the "vein in its downward course by the line *f–g*, running "south 43 west, extended vertically downward, it is "erroneous, and should be modified."

As we understand the decree of the trial court, no attempt was made by it to limit the *extralateral* right by this bounding plane. The vertical bounding plane was fixed for the purpose of determining the *intralimital* rights on the ledge. As the vein dipped to the east in its course downward, it would not pass out of and beyond the plane drawn through *f–g*. The vein dips *away* from this plane, and not toward it. The decree of the trial court was framed in the light of this geological fact. Should the vein on its downward course by some freak of nature change and dip in an *opposite* direction, the modification might become effective, otherwise it is a mere abstraction.

There is nothing in the decree of the trial court purporting to limit the *extralateral* right by a vertical plane drawn through any *side* line. The extralateral right fixed by this decree is defined with reference to the *end* lines *g–h* and *a–p*. That the Circuit Court and Circuit of Appeals are in entire harmony upon

this point is manifest from the concluding paragraph of the opinion of the latter court. "It" (the extralateral right) "should be bounded by vertical planes "drawn downward through the end line *g–h* and the "*end line a–p* extended indefinitely in their own direc-"tion." Of course the Court means by this, *extended in the direction of the dip*, as by extending such a line in the opposite direction there would be nothing on which it could operate. There would be no "outside parts" related to the vein lying within the surface boundaries which would be intersected by a vertical plane drawn through such extended surface boundary.

The decision of the Circuit Court of Appeals, construed in the light of the conceded facts, is a practical affirmance of the decree of the court below. Much of the argument of counsel for appellant is based, in my judgment, upon a mistaken view of this decision. We shall have occasion to recur to this.

The concurring judgment of both courts may be thus succinctly stated: The appellant may not pursue the contact vein on its strike or onward course beyond the lines *f–g* and *g–h*. His extralateral right (the right to pursue the vein on its downward course) is to be defined by vertical planes drawn through *g–h* and *a–p* extended in the direction of the dip. The appellant may pursue the vein on its downward course outside of and beyond its side line planes, provided he keeps within his end line planes down through *g–h* and *a–p*.

Assignments of Error.

The record shows ten assignments of error. The first eight attack so much of the decree as establishes the line *g–h* as an end line, for the purpose of determining the extralateral right, or fails to establish the line *f–g* and that line produced indefinitely in the direction of *g'* as such end line. The last two assail so much of the decree as awards to appellee the right to pursue the vein on its downward course underneath the parallelogram *h–l–k–h'*. I have failed to note in these assignments any specific objection to so much of the decision of the Circuit Court of Appeals as directs a modification of the decree entered in the court below.

There are but two questions submitted to this Court under the assigned errors:—

(1) What are the extralateral rights of the appellant on the contact vein ?

(2) What portion of the contact vein underlying appellant's surface boundaries was conveyed to him by the Act of May 10, 1872 ?

The Law.

Appellant's grantors originally located 3100 feet of the Providence or granite ledge *z–z'*. The Providence patent purports to grant "3100 linear feet of the "Providence ledge with surface grounds as herein-"after described," as shown in figure 1, opposite p. —

of this brief. The length of the lode between points of intersection with the lines *g–h* and *a–p* is only 2400 feet.

It is claimed by appellant that the principal thing patented is the lode; that the northern limit of appellant's right upon the lode is at the point *z'*, thirty feet north of the line *g–h*, and the southern limit 670 feet south of the line *a–p;* that the patented surface area was simply granted for convenient working purposes, and the lines of such surface, however they might have been constructed, could not abridge or limit the right upon the ledge; that although the lines *g–h* and *a–p* are crossed by the lode in its course, or strike, and are substantially parallel to each other, they cannot be considered as end lines, because they do not bound the extremities of the lode right of 3100 feet; that such lines do not perform the function of end lines as applied to the granite ledge acquired under the Act of 1866, and, therefore, should not be considered as factors in determining petitioner's rights upon the contact ledge *x'–x''*, which came to him by the grace of the Act of 1872; that any line of the many-sided figure of the location which may be fortuitously crossed by a ledge on its onward course other than the ledge upon which the patent was based, becomes, from the fact of such crossing, an end line, not simply for the purpose of defining the right to pursue the vein on its strike, but also for the purpose of defining and regulating the dip rights and extralateral privileges, and is to be produced indefinitely in the direction of the dip.

This leads us to the discussion of the law and the decisions thereunder.

NOTE.—*In developing the law of this case, counsel for appellant frequently cite "Lindley on Mines," a treatise, of which I am the author. Their courteous and graceful reference to the work exhibits a chivalrous and generous spirit, not always displayed towards an adversary in forensic debate. In the presence of such compliments as are thus expressed and implied, I am almost constrained to avoid all further reference to the treatise. I shall only do so where in my humble judgment the distinguished counsel have drawn erroneous conclusions from cited sections, or overlooked some elements which are logically deducible from accepted doctrines. The work is not an ex cathedra statement of the law. It will only be accepted, as this brief will be, either as based upon sound reasoning, and therefore a correct exposition, or as constructed upon false or mistaken theories, and therefore to be disregarded.*

I.

As to appellant's rights to the "Granite Ledge" under the Act of 1866, and the patent issued thereunder, and the relationship between that lode and the surface boundaries of the "location."

We are not directly concerned with the pursuit of the granite ledge *z–z'* after it leaves the surface boundary lines of the Providence location. A discussion of the rights asserted by petitioner thereto is simply incidental to the main issue.

That he cannot follow it on its course beyond the surface boundaries is no longer an open question.

The doctrine contended for by the appellant that the Providence patent conveyed 3100 feet of the granite lode, although only 2400 feet was included within the surface boundaries — thus giving the patentee the right to pursue the vein on its strike beyond these boundaries — has been judicially condemned in a number of well considered cases arising under the Act of 1866 —

Flagstaff Mining Co. v. *Tarbet*, 98 U. S. 463;
McCormick v. *Varnes*, 2 Utah, 355;
Wolfley v. *Lebanon Mining Co.*, 4 Colo. 112,—

as well as under the existing law.

Argentine Mining Co. v. *Terrible Mining Co.*, 122 U. S. 478;
Iron Silver Mining Co. v. *Elgin*, 118 U. S. 196.

The most recent decision upon the subject is by the Supreme Court of Montana.

Montana Ore Purchasing Co. v. *Boston & M. C. C. & S. M. Co.*, 51 Pac. Rep. 159.

The facts involved in the Flagstaff-Tarbet case are illustrated on pages 70 and 712, Vol. I, and in the Argentine-Terrible case on page 713, Vol. II, of "Lindley on Mines," referred to by counsel for appellant (appellant's brief, p. 15).

The patents in all these cases were similar in terms to the Providence patent under consideration in this case.

This is manifest from the record on file in this Court in the Flagstaff case *supra* (No. 173, October Term, 1878), as well as from the opinion of the Supreme Court of Utah in *McConnell* v. *Varnes*, *supra*, and of this Court in the Flagstaff case.

If these patents purport to grant more of the vein in length than is included within the surface boundaries, they are broader than the law, and to this extent are void and unauthorized.

Counsel for appellant quotes from Section 568, "Lindley on Mines":—

"The government being the owner of the fee may "carve from it the ownership of the vein. It may "grant the surface to one and the vein to another."

This was said in reference to the grant of the right to pursue the vein in *depth*—the extralateral right—where the law expressly provides for such a severance. In the case of rights on the vein in *length*, no sanction of the law is found for a grant beyond the end lines. This must be true, or the decisions in Flagstaff-Tarbet and Argentine-Terrible cases, are to be set aside as valueless.

Whatever may have been the rights under the original locations by virtue of the miners' rules and customs, the patent sought for and obtained in connection with the law under which it is issued is the measure of appellant's rights.

Under this patent, as construed by the courts, the lines *g–h* and *a–p* are end lines on the granite ledge—

the *end lines* of *the location*,—beyond which petitioner is not permitted to go on either strike or dip.

As was said by this Court in the Flagstaff case, *supra*:—

"We think that the intent of both statutes (1866 "and 1872) is, that mining locations of lodes or veins "shall be made thereon lengthwise in the general "direction of such veins or lodes on the surface of the "earth where they are discoverable, and that the end "lines are to cross the lode and extend perpendicu-"larly downward."

In this view the lines *g–h* and *a–p* are ideal end lines, and, considered in connection with the ledge originally patented which crosses them, they are the only lines of the location which could in any way be treated as end lines at the time the Act of May 10, 1872, was passed, granting to the patentee the *other* ledges apexing within the lines of the Providence location. The trial court and the Circuit Court of Appeals so determined.

II.

As to appellant's extralateral right upon the "Back" or "Contact" ledge under the Act of 1872, and the relationship between that ledge and the surface boundaries of the "location."

The patent issued to appellant's grantors conveyed but one vein.

Eureka Case, 4 Sawy. 302, 323;

Eclipse G. & S. Mining Co. v. *Spring*, 59 Cal. 304.

All other veins were required by the terms of the law to be excepted from the patent.

"No patent shall issue for more than one vein or "lode, which shall be expressed in the patent issued."

Act of 1866, sec. 3, 14 Stats. at Large, p. 251.

It is thus *expressed* in the Providence patent. (Transcript, p. 354, paragraph "*First.*")

This vein was, of course, the granite vein.

Whatever rights upon the contact or back ledge appellant may have, they all accrued to him by virtue of the following provisions of the Act of May 10, 1872:—

"The locators of all mining locations heretofore "made, or which shall hereafter be made, on any "mineral vein, lode, or ledge, situated on the public "domain, their heirs and assigns, where no adverse "claim exists on the tenth day of May, eighteen hun- "dred and seventy-two, so long as they comply with "the laws of the United States, and with State, Ter- "ritorial, and local regulations not in conflict with the "laws of the United States governing their possessory "title, shall have the exclusive right of possession and "enjoyment of all the surface included within the "lines of their locations, and of all veins, lodes, and "ledges throughout their entire depth, the top or apex "of which lies inside of such surface lines extended "downward vertically, although such veins, lodes, or "ledges may so far depart from a perpendicular in "their course downward as to extend outside the

" vertical side lines of such surface locations. But their " right of possession to such outside parts of such " veins or ledges shall be confined to such portions " thereof as lie between vertical planes drawn down- " ward, as above described, through the end lines of " their locations, so continued in their own direction " that such planes will intersect such exterior parts of " such veins or ledges. And nothing in this section " shall authorize the locator or possessor of a vein or " lode which extends in its downward course beyond " the vertical lines of his claim to enter upon the " surface of a claim owned or possessed by another."

Act of May 10, 1872, sec. 3;
Sec. 2322, U. S. Rev. Statutes.

It will thus be seen that by the terms of the Act the grant to such parts of the contact ledge as in depth might pass outside of and beyond vertical planes drawn through the surface boundaries, was limited to such "outside parts" of such vein as was found between vertical planes drawn downward "through *the end lines* of their locations * * * so "continued in their own direction that such planes will "intesect such exterior parts of such veins or ledges."

What were the *end lines* of that location at the time the Act of 1872 was passed, and to which the Act referred? (See figure 1, opposite p. 4 of this brief.) Certainly not the line *f–g*, as this line was established long before as a surface boundary—not intersected or touched by the granite ledge—and at that date at least

not performing any functions of an end line. Certainly not at the termination of the 3100 feet at z', as no end line is there established, and, if it is implied, its length is simply the width of the vein, and there is no apex of the back vein found within any surface bounded by such hypothetical end line.

It seems so obvious to us that the line g–h is the *end line* of the location referred to in section 3 of the Act of May 10, 1872, that we can see no necessity for argument.

But appellant asserts that because the back or contact ledge crosses the line f–g, that line becomes an end line, and he is entitled to produce it indefinitely in the direction of g'. This course of reasoning involves him in this absurdity. He has an end line plane somewhere on the granite ledge—either the line g–h or an imaginary one whose length is the width of the lode, drawn at right angles to the course of the vein at z'. His contention would give him, in addition to this, another and altogether different end line plane on the back vein—the line f–g and that line produced indefinitely, and, if any other veins should be discovered passing out of any of the other numerous surface lines, each one of these lines would become an end line, to be produced indefinitely in its own direction, and he would have as many different end line planes as he has surface boundaries crossed by a ledge, giving his location with his produced end lines the appearance, in horizontal projection, of a buzz-saw.

The end line cases, in which the courts generally announce the doctrine that where a vein in its course crosses side lines those lines become end lines, are all cases where the vein crosses two parallel lines.

Flagstaff v. *Tarbet*, 98 U. S. 463;
Argentine v. *Terrible*, 122 U. S. 478;
King v. *Amy—Silversmith Case*—152 U. S. 222.

Speaking of these cases, Judge Hallett, in a very recent case, says:—

"These decisions do not affirm that all lines of a "location crossed by a lode on its strike shall be end "lines. The most that can be deduced from them is, "that opposite lines parallel to each other, when "crossed by the lode, are end lines."

Del Monte M. & M. Co. v. *New York L. & C. Co.*, 66 Fed. 215.

And this Court, in the recent case of *Last Chance M. Co.* v. *Tyler*, 157 U. S. 683, asserts that these cases do not determine the rule to be applied where a vein crosses an end line and a side line.

The side line crossed by a ledge performs the function of an end line to the extent of stopping the further pursuit of the vein on its strike, and this is the extent only to which the decision of the courts have reached.

In the case of the *Iron S. M. Co.* v. *Elgin M. Co.*, 118 U. S. 208, Justice Field, delivering the opinion of the Court, says:—

"It often happens that the top or apex of more than "one vein lies within such surface lines, and the "veins may have different courses and dips, yet his "right to follow them outside of the side lines of the "location must be bounded by planes drawn vertically "through *the same end lines.* The planes of the end "lines cannot be drawn at right angles to the courses "of all the veins if they are not identical."

Judge Hawley, in his opinion in the case at bar, quotes the above citation, adopts its reasoning, and thus sums up the case:—

"It necessarily follows that the end lines of the "Providence survey must be considered by the "Court as the end lines of any and all other lodes or "veins which lie inside of such surface lines."

Trans., p. 90;
63 Fed., p. 557.

"In the present case the end lines of the Provi- "dence — *a–p* and *g–h* — are conceded to be sub- "stantially parallel with each other, and that the "Providence lode in its course lengthwise passes "these end lines. Complainant's contention would "take the 'back' or 'contact' vein outside of the "plane of the northerly end line of the Providence "drawn downward vertically, and give to him extra- "lateral rights not granted by the patent nor given "to him by the granting provisions of the Act of "1872."

Trans., p. 91;
63 Fed., p. 558.

The decree of the trial court as affirmed by the Circuit Court of Appeals in the case at bar dealt liberally with petitioner in fixing his bounding plane on the back or contact ledge through the line *g–h*, and that line produced indefinitely in its own direction, *i. e.* towards the dip of the vein. This is such segment of the ledge "as lies between vertical planes drawn "downward * * * through the end lines of their "location," and is that segment *donated* to petitioner by the generosity of the Act of 1872.

We think it clearly established that the end line plane, fixed by the Circuit Court of Appeals, is an application of a principle of law recognized uniformly by the courts, and that there are no conflicting decisions upon the subject to be reconciled or harmonized by the Court.

Counsel for appellant, in commenting on the establishment of the line *g–h* and the plane of that line indefinitely, says that it results "in giving, as the dividing "line between the two properties, a line that does not "run between them at all" (appellant's brief, p. 33), and proceeds to evolve from this certain illustrations by way of *reductio ad absurdum.*

Inviting the Court's attention for the moment to appellant's figure 9, opposite page 33 of his brief, it will be observed that he has protracted the lines *g–h* and *a–p* in *both* directions, east and west, in the direction of the dip, as well as in the opposite direction. In doing this, counsel misinterprets the decree of both courts, as we have heretofore shown. (*Ante*, page 12.)

As a surface end line can only be extended in its own direction for the purpose of constructing a bounding plane which will intersect the "outside parts" of the vein after passing on its downward course beyond a side line plane, and as this line or plane performs only this function, will counsel inform the Court what outside parts of the contact vein lying west of any of the Providence western boundaries, could be reached by appellant in following the vein on its *downward* course from any point on the vein within the Providence surface boundaries? The vein on such *downward* course does not pass out of and beyond the plane drawn through the line *f–g*, or any of the western boundaries; consequently there is no sanction for arbitrarily producing this line, or the line *a–p*, indefinitely in its own direction *westerly*. There is nothing upon which such extended planes can operate. Counsel for appellant candidly says that the contact vein passes out of the Providence and into the Champion on its *strike* and not on its dip (appellant's brief, p. 33).

That the line established by the Court may not be a common surface boundary is of no moment. Logically stated, the Court is only called upon to define the segment of the contact vein which was granted to appellant by the Act of 1872, and in this determination the lines of other claims are in no sense factors. The line *f–g* is, for a short distance only, coterminous with appellant's New Years Extension boundaries. The south end line of the New Years Extension cuts

the contact vein at right angles, while the line *f–g* cuts it at an obtuse angle. The dip rights on a vein are determined by the true end lines of the claim, and are not, necessarily, controlled or affected by the fact that such end lines may or may not be also the boundaries of an adjacent proprietor.

Surface rights between two coterminous mining proprietors are defined by coterminous surface boundaries. The line *f–g* performs this function to a limited extent, and this function alone. Dip rights are determined by the "end lines of the location," whether coterminous or not. The line *g–h* is such an end line.

Having determined what segment of the contact vein passed to appellant by the Act of 1872, it is easy to determine what remained subject to appropriation under the mining laws.

What was so subject to subsequent appropriation will be considered in connection with the discussion of the appellant's intralimital rights in this vein.

III.

As to the Alleged Estoppel.

The evidence relied upon to establish a so-called estoppel is found in the record.

This evidence consists of recitals in a relocation made by respondent's agents, called the New Years Extension Relocation, certain proceedings of the Board of Directors of appellee, and some parol testimony of an indefinite nature.

The relocation containing the recitals relied upon is found upon pages 31 and 32 of the transcript.

It may be temporarily conceded for the purpose of argument that the location of the New Years Extension, as originally made on the surface, overlapped and conflicted with the Providence patented ground, crossing the line *f–g*, the conflict area consisting of a small triangle, covering a small segment of the contact lode within the Providence ground.

The avowed purpose of this relocation was "to cor- " rect errors of description of said original notice and " to conform said description to the actual boundaries " of said mine and to the requirements of the law."

Trans., p. 31.

The notice of relocation also contained the following recital:—

"And, whereas part of this claim as originally " described, and as hereby relocated, conflicts with the " rights granted by the letters patent of said Provi- " dence mine, said lot 40; now, therefore, so much of " this claim, both for lode and surface ground, as " originally conflicted, or now conflicts, with any por- " tion of the surface or lode claims, or rights granted " by said patent, is and are hereby abandoned, which " portion of this claim so abandoned is described as " follows, to wit: All that portion of the above- " described New Years Extension claim for surface " and lode which lies south of the northern boundary " line of said Providence mine, which runs N. 43 deg. " 10 min. E., across the southeastern corner of this " claim."

This relocation is dated November 15, 1884.

With reference to this notice of relocation, the attention of the Court is invited to the following facts:—

The portion of the surface and lode abandoned is that portion which *was granted to the Providence Company by the Providence patent.* It did not purport to yield or surrender to the Providence Company anything which was not already covered by their patent. The Providence Company was not a party to the instrument. It is in no sense an end line *agreement*, as in the Eureka Case, 103 U. S. 839. It was simply a recognition of the line as a common surface boundary, and an acknowledgment that the Providence owned such portion of the contact ledge as was granted by the Act of Congress, May 10, 1872. That is the length and breadth of it.

In addition to this it ante-dated by six years the acquisition by appellee by certificate of purchase of the title to the New Years Extension, the certificate having been issued October 4, 1890. Even if the relocation could be possibly distorted into anything like an equitable estoppel, the estoppel only operated upon such title as respondent then had, and did not control title subsequently acquired.

Russell v. *Brosseau*, 65 Cal. 605;
Montgomery v. *Whiting*, 40 Cal. 294;
Thrift v. *Dulaney*, 69 Cal. 189;
Caperton v. *Schmidt*, 26 Cal. 513;
Mahoney v. *Van Winkle*, 33 Cal. 448;

Reed v. *Calderwood*, 32 Cal. 109;
Amesti v. *Castro*, 49 Cal. 325;
Merryman v. *Bourne*, 9 Wall. 592;
Erwin v. *Garner*, 9 N. E. 417.

The entry and payment to the Government and the issuance of a certificate of purchase is a newly acquired title.

Hamilton v. *Sierra Nev. G. & S. M. Co.*, 13 Sawy. 113;
Thrift v. *Dulaney*, 69 Cal. 191.

A relocation of the same mining claim has been held to be a newly acquired title.

Russell v. *Brosseau*, 65 Cal. 605.

A patent issued upon a Mexican grant is a newly acquired title, although the inchoate right to a patent existed at the time of the treaty of cession.

Amesti v. *Castro*, 49 Cal. 325;
Merryman v. *Bourne*, 9 Wall. 592;
Wilkins v. *McCue*, 46 Cal. 656.

If the abandonment included anything not covered by the Providence patent, it was an abandonment to the Government, and not to the owners of the Providence, and the subsequent deed of the Government conveyed the title to the petitioner, and the Providence owners have no cause of complaint.

The trial court held that this abandonment did not give to the Providence any greater rights than it pre-

viously had (Opinion, trans., p. 93), thus obviating the necessity of passing upon the question of subsequently acquired title. Appellee's title was evidenced by a certificate of purchase. (Trans., pp. 261, 262.) Certainly this relocation, antedating the certificate of purchase (the equivalent of a patent) could not be used for the purpose of impeaching appellee's conveyance from the government, or limit its operative force. So much for the so-called "agreement," which is in no sense an agreement; nor does it possess any of the essential elements of estoppel.

In the record, as well as upon the maps of appellant, mention is made of the "Annex" location. It cut no figure in the case. It had nothing to do with appellee's title to the "New Years Extension." It was like many other locations in the mining regions whose life is a year and a day.

As to the records of the corporation introduced on the question of supposed estoppel, they will be found in the transcript at pages 175 and 176. They establish the authority to make necessary relocations, and as the reports from the mine were "of an unsatisfactory and incomprehensible nature," the superintendent, Mr. Vincent, was sent to the mine and authorized to use his own discretion in regard to the work to be prosecuted, and to stay there such a length of time as he may consider necessary.

From this, counsel for petitioner wish to infer authority delegated to Vincent to agree upon a bounding plane. If such a construction could be

possibly placed upon the action of the Board of Directors, Vincent never attempted to exercise any such authority.

Mr. Vincent was permitted to testify under respondent's objection that he laid out the Champion shaft parallel to the line *f–g*—which is the only way any sane man would lay it out,—and that he told Richard Walrath, brother of petitioner, that so long as he was superintendent, he would respect the line *f–g*.

This is all there is in the record to support the alleged estoppel.

Certainly Vincent had no implied authority to assent to any boundary line.

Overman S. M. Co. v. *American S. M. Co.*, 7 Nev. 312.

If he did, as before observed, he never attempted to exercise it. In any event, mining companies are not to be divested of their rights in any such loose and equivocal way. An agent may in some cases, acting within the scope of his authority, bind a corporation. But the existence of such authority and its extent must be shown, not by the testimony of the agent, but by the action of the Board of Directors duly convened and acting as a Board, as evidenced by the records of the company.

Counsel for appellant lays some stress upon the fact that the Champion Company never undertook to penetrate the plane drawn through the produced line *f–g–g'* until a short time before the commencement of

this action, and reasons from this an acquiescence in this line as thus produced from lapse of time, with a suggested element of an adverse holding.

There are several complete answers to this question.

(1) The line *f–g* was only recognized as an exterior boundary of the Providence surface. It never was recognized as a line that could be produced indefinitely beyond its surface termination. We have never disputed the line *f–g* as being a true surface boundary line of the Providence.

(2) This action was commenced in 1892. Appellee's patent (certificate of purchase) was not issued until 1890. The Statute of Limitations in California is five years.

(3) The possession of the Providence surface is not possession of any part of the ledge outside the surface boundaries. Nor is it possession of any part of the vein within vertical planes drawn through the surface boundaries, the surface which has been by operation of law severed from the ownership of the soil.

Caldwell v. *Copeland*, 37 Penn. St. 427;
Armstrong v. *Caldwell*, 53 Penn. St. 284.

By the Act of 1866, under which appellant claims title to the Providence mine, the contact ledge was specially reserved out of the patent. It was severed from the overlying surface.

See, *ante*, subd. II, page 19;
2 Lindley on Mines, §§ 568, 812.

Up to the passage of the Act of 1872, appellant's possession of the Providence surface was not in law the possession of any part of the contact vein. After the passage of this Act, the surface possession could only be extended to such portion of the vein as was clearly within the grant. It certainly could not be extended to "outside parts" not covered by the grant.

(4) A glance at the underground workings of appellee, shown in red on figure 5, opposite page 8, of this brief, shows that none of the upper levels reached plane *f–g–g'*. The condition of these drifts indicates the reason why they were not extended. There was nothing appearing in their face to justify the miner in continuing the pursuit of the vein. If all these drifts came up to this plane and stopped, it might be some evidence of the appellee's views as to the extent of the appellant's underground rights. When appellee did cross this plane in the lower levels, the inference is irresistible that its underground works had reached a pay "shoot" and followed it.

IV.

As to appellant's intralimital rights to the contact ledge, and that portion of the decree awarding to appellee the right to take that segment of the vein underlying the parallelogram h–i–k–h'.

Assuming that the court below was right in fixing the line *g–h* and its prolongation as the line through which a bounding plane should be drawn defining appellant's *extralateral* right, the case narrows itself

down to a consideration of that segment of the contact ledge lying vertically underneath that portion of the Providence surface boundaries defined by the parallelogram *h–i–k–h'*, shown on the several exhibits (figure 4 of this brief, opposite page 10, and figure 5, opposite page 8).

It will be observed that this segment of the vein lies north of and beyond the *end* line of the location as fixed by the Court. In other words, relatively considered, that portion of the vein is a part of the vein on its *strike*, and not on its dip.

That the appellant cannot pursue this vein on its *strike* beyond the end line plane established by the Court, would seem to follow as a corollary from the rules announced under subdivision I of this brief. In addition to this, it must be borne in mind that the Providence patent is of itself evidence of no title to any segment of the contact vein.

The Act of 1872 is the appellant's muniment of title to such segment. The patent is resorted to for the purpose of ascertaining what were the lines of the location.

The language of the Act granting veins which have their tops or apices within the surface boundaries applies to locations theretofore and thereafter made indiscriminately. Therefore in determining the extent of this grant, so far as the Providence is concerned, we are required to accept the interpretation applied by the courts to the Act of 1872 in considering locations made under it. In other words, no greater *intralimi-*

tal rights are conferred upon the Providence owner than could be acquired through a location similar in form made under the Act of 1872, where the vein in controversy crosses a *side* and not an *end* line.

In determining what is the correct exposition of the law in a case of this character, we naturally seek light in those cases involving a discussion of the extralateral right where a vein crosses a side line, and from these cases select and apply the underlying principles resorted to in defining this right.

As to what these principles are, I have endeavored to explain in §§ 586, 587, 588, 589, 590, 591, and 610, of "Lindley on Mines." Most of these sections are referred to by counsel for appellant. Some of them are not. I may therefore be excused for inviting the attention of the Court to them.

In § 610 I have endeavored to present my understanding of the rule to be applied to the case at bar.

In my judgment, the authorities cited in support of the doctrines announced in these sections permit the following deduction: —

The extent of the right in a vein in depth depends upon the extent of the top or apex of a vein found within the lines of a location, at least in the presence of an adjoining proprietor, covering by regular valid location that portion of the apex lying outside of the prior locator's boundaries. In other words, the right of a first locator to the vein in depth is to be determined by (1) the length of the apex within his surface; (2) the application at the point of departure

from the side line of the plane of the end line of the location.

That a junior apex proprietor may follow his vein on its downward course into and underneath the ground of a prior locator is, I think, logically determined in the case of *Colorado Central* v. *Turck*, 50 Fed. 888, 895.

The instances where a bounding plane of a prior appropriator may not be invaded by a junior locator are illustrated, according to my understanding of the law, in § 609, "Lindley on Mines," where the cases are cited and commented upon.

To sustain his theory as to appellant's ownership of that segment of the vein underlying the parallelogram *h–i–k–h'*, counsel cites the cross-lode cases of *Wilhelm* v. *Silvester*, 101 Cal. 358, and *Watervale* v. *Leach*, 33 Pac. Rep. 418. These cases are not in point. In each of them there was a surface conflict and an attempt of a junior locator to appropriate that portion of the *apex* of a vein lying within a senior locator's surface boundaries. (See discussion and illustrations in §§ 558, 559, 560, "Lindley on Mines," cited by appellant.)

I am advised that this Court has now under consideration the question as to the rights of the respective parties where a vein passes out of a side line of one location into and through the end line of another. I refer to the case of *Del Monte M. & M. Co.* v. *The Last Chance*, pending on appeal from the Eighth Circuit. I understand that the case has been ably argued

and presented, and I cannot hope to add anything to what was there said.

Counsel for appellant, in discussing the question of his extralateral right, invites attention to the fact that, by constructing an end line plane through the line *f–g–g'*, he would have an end line nonparallel and diverging in the direction of the dip, thus giving him in depth infinitely more longitudinally than he has apex within his surface boundaries. He says that this makes no difference, as under the Act of 1866 *end* lines were not required to be parallel, and cites "Lindley on Mines," § 592. If the Court will examine his figure 9, opposite page 34 of his brief, it will observe the modesty of his claim in the direction of the dip. Within an assumed apex of seven hundred feet he has at a depth of say two thousand feet in the neighborhood of *five thousand* feet on the vein, measured horizontally between *g'* and *E'*, and constantly increasing.

If the line *f–g* had been an original end line on the granite ledge at the time the Act of 1872 was passed, and the contact ledge was afterwards discovered also crossing it, I am of the opinion that the rule announced in "Lindley on Mines," § 592, would apply for the reasons therein explained. But as the line *f–g* was not such an end line, it seems to us that his illustration is a most powerful and convincing argument against his own contention.

The Act of 1872 was liberal enough in its donation, confirming to appellant as much of the two veins as might be within his original end line planes. His

claim to another end line, giving him in depth a horizontal length of a possible ten thousand feet or more on another vein, in our judgment lacks even plausibility.

If there was any error committed by the Circuit Court of Appeals, or the Circuit Court, it was to the detriment of the appellee, in not fixing the bounding plane *v–v'* at the point where the contact ledge crossed the Providence line *f–g*.

As the segment underlying the parallelogram *h–i–k–h'* is without the end line planes of the Providence, is in no way related to that portion of the apex lying within its boundaries, but is within the end line planes of the Champion and underlying its duly appropriated apex, the Court was right in permitting the Champion to take this segment of the vein.

We respectfully submit that the record discloses no error, and that the decree should be affirmed.

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